No. 86-768

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, ALBERT WAYNE COX, AND MICHAEL G. CADE,
Respondents.

BRIEF OF RESPONDENTS COX AND CADE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JONES, JONES, CURRY & ROTH
FRANKLIN JONES, JR.
(Counsel of Record)
P.O. Drawer 1249
Marshall, Texas 75670
214/938-4395
Attorneys for Respondents Cox and Cade

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

18pp

QUESTION PRESENTED FOR REVIEW

Petitioner's first question regarding the effect of an allegedly erroneous jury instruction does not call into question the judgment for Respondents in the trial court below. Therefore, Respondents Cox and Cade reply only to the second question presented by Petitioner Kansas City Southern Railway Company in its Petition for Writ of Certiorari. A grant of the writ and a reversal on the first question alone would result only in a new trial of Petitioner's third-party action against Respondent Missouri Pacific Railroad Company. Accordingly, the Question Presented for Review in this Response is:

1. Is the affirmance by the Fifth Circuit Court of Appeals of the trial court's exercise of its discretion in allocating peremptory challenges according to 28 U.S.C. Section 1870 and in overruling an objection to a juror for cause a matter of special importance justifying review on writ of certiorari?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules of Court:

No. 86-768

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
ALBERT WAYNE COX, AND
MICHAEL G. CADE,
Respondents.

BRIEF OF RESPONDENTS COX AND CADE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Injured in a forced jump from their locomotive traveling on a collision course with Petitioner's train, Respondents Cox and Cade sued Petitioner, Kansas City Southern Railway Company (KCS) in a diversity action for common law negligence. Petitioner KCS brought a third party action for contribution against Respondent Missouri Pacific Railroad Company (MoPac), the employer of Cox and Cade.

A jury was chosen before Judge Robert Parker of the Eastern District of Texas based on a Pre-Trial Order in which Cox and Cade alleged negligence against the KCS; the KCS denied its own liability, alleged negligence on the part of MoPac and Cox and Cade, and disputed the extent of Respondents' injuries; and the MoPac denied liability and disputed the nature and extent of Respondents' injuries. (Rec. at 239-45).

The trial judge allocated four peremptory challenges to Cox and Cade to be exercised jointly and four to KCS and MoPac to be divided and exercised separately. After voir dire examination, Petitioner KCS objected to the allocation of peremptory challenges. However, it failed to name or describe to the court a single objectionable juror it was forced to accept on the panel. (Second Supplemental Rec. at 1-4, reproduced at Appendix A, *infra*).

Petitioner also objected for cause to juror Bray who had revealed on voir dire that he car-pooled with the mother of the wife of a possible witness. The trial judge conducted an examination of juror Bray which established that his narrow knowledge of the case would not prejudice the parties. (First Supplemental Rec. at 22-27). Accordingly, Judge Parker overruled Petitioner's challenge for cause. (First Supplemental Rec. at 32). Again, the KCS made no showing that it was forced to accept an objectionable juror because it used one of its peremptories to eliminate juror Bray, nor did it raise the argument that the jury that actually heard the case was anything but fair and competent.

In its appeal to the Fifth Circuit, Petitioner KCS complained of the peremptory strike allocation and the denial of the challenge for cause and urged that the *combination* of these two discretionary rulings by the trial judge

somehow was prejudicial to its constitutional right to a fair and impartial jury. (Brief for Appellant at 26). It argued that the trial court should have sustained its challenge for cause to juror Bray because of the court's distribution of peremptory challenges in the case. Judges Gee, Politz, and Garwood of the Fifth Circuit Court of Appeals considered the allocation issue and the challenge for cause issue separately and determined that the trial court had properly exercised its discretion in each instance. Obviously, two rights cannot make a wrong; therefore, the Fifth Circuit did not comment on the joint effect of the rulings. It affirmed the judgment of the trial court on all issues.

Petitioner filed a Petition for Rehearing in the Fifth Circuit Court concurrently with its Suggestion for En Banc Hearing. Conspicuously absent from its en banc review request was any mention of the peremptory challenge or challenge for cause issues. Petitioner's Suggestion for En Banc Hearing provides on page iii:

> Necessity for En Banc Consideration
>
> I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:
>
> The panel found the Trial Court's instruction on negligence was error, but substituted its finding for the finding of a jury on the issues of negligence and proximate cause, denying the KCS the right of trial by jury on those issues as guaranteed by the 7th Amendment.
>
> Respectfully submitted,
>
> /William C. Gooding/
> William C. Gooding
> ATTORNEY FOR APPELLANT
> KANSAS CITY SOUTHERN
> RAILWAY COMPANY

The KCS's Petition for Rehearing and Suggestion for En Banc Hearing were denied.

REASONS WHY THE WRIT SHOULD BE DENIED

1. THE DECISION OF THE COURT BELOW GAVE FULL CONSIDERATION TO THE JURY SELECTION ISSUES AND DECIDED THEM CORRECTLY.

A. The Allocation of Peremptory Challenges.

In reviewing a trial judge's allocation of peremptory challenges, the standard of review is whether the trial judge abused his discretion. *Fedorchick v. Massey-Ferguson, Inc.*, 577 F.2d 856 (3d Cir. 1978). In this multi-party suit, the trial court employed its statutory authority under 28 U.S.C. Section 1870[1] to allocate four peremptory challenges to Plaintiffs Cox and Cade and four to Defendant KCS and Third-Party Defendant MoPac to be divided and exercised separately. The Fifth Circuit panel considered the de facto alignment of the parties, reviewed the evidence, and dismissed as "not persuasive" the argument of the KCS that Cox and Cade and MoPac were allies in this action. (Opinion at 5). The Fifth Circuit followed established precedent, its own and that of other circuits, in determining that no abuse of discretion occurs when the trial court allots the same number of peremptory chal-

---

1. Section 1870 of Title 28, United States Code, provides:

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purpose of making challenges or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.
>
> All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

lenges to the Plaintiffs as to the Defendant and Third-Party Defendant jointly.[2]

The Court further found that the Petitioner failed to demonstrate any prejudice in the allocation because there was no showing that the additional peremptory challenges it requested would have been used. Only in its Petition for Rehearing in the Fifth Circuit, and now in its Application for Writ of Certiorari, has the Petitioner described two jurors it apparently would have struck. It failed to name or identify these jurors to the trial judge or to allude to their unsuitability, a prerequisite to establishing prejudice and harm in the allocation of peremptory strikes. *Goldstein v. Kelleher*, 728 F.2d 32, 38 (1st Cir.), *cert. denied*, 105 S.Ct. 172 (1984); *Matanuska Valley Lines v. Neal*, 255 F.2d 632, 636 (9th Cir. 1951); *Standard Industries, Inc. v. Mobil Oil Corp.*, 475 F.2d 220, 225 (10th Cir. 1973).

B. The Challenge for Cause.

A district court has wide discretion in ruling on challenges for cause and will be reversed only if there is a manifest abuse of discretion. *Dennis v. United States*, 339 U.S. 162, 168 (1949). The trial judge in this case refused the challenge for cause by KCS to juror Bray based on his having heard about the accident in question from a potential witness' mother-in-law. (First Supplemental Rec. at 32). Citing *Irvin v. Dowd*, 363 U.S. 717 (1961), the Fifth Circuit panel noted that a dismissal for cause is in order only when exposure to information about an accident has resulted in a fixed opinion about the merits of the case. The Court examined the record and determined that the

---

2. The Court cited *Carey v. Lykes Brothers Steamship Co.*, 455 F.2d 1192 (5th Cir. 1972); *Goldstein v. Kelleher*, 728 F.2d 32 (1st Cir.), *cert. denied*, 105 S.Ct. 172 (1984); *Fedorchick v. Massey-Ferguson, Inc.*, 577 F.2d 856 (3d Cir. 1978).

venireman had satisfied the trial court that his knowledge of the facts would not affect his service as a juror.

The Fifth Circuit further found no evidence in the record that the Petitioner was forced to accept an otherwise objectionable juror because it had used a peremptory strike on juror Bray. The KCS raised no argument in the trial court that the jury which actually heard the case was anything but fair and impartial. (Second Supplemental Rec. at 1-4). Having described and named jurors it found unacceptable *for the first time* in its Petition for Rehearing in the Fifth Circuit Court of Appeals, the KCS wholly failed to demonstrate harm; and the Fifth Circuit correctly found no merit in the trial court's denial of the challenge for cause.

C. The Tandem Effect of the Jury Selection Issues.

Petitioner KCS urges that the "tandem" effect of the trial court's apportionment of strikes coupled with its denial of Petitioner's challenge for cause denied it a fairly constituted jury. The KCS asserts that "the denial of petitioner's challenge-for-cause, though it might be affirmed in a vacuum, had the actual effect of substantially impairing petitioner's right of peremptory challenges." (Petition for Writ of Certiorari at 13). Petitioner appears to urge that when a trial court overrules a party's challenge for cause, it must grant an additional peremptory strike to that party to assure a fair trial. This argument makes no legal sense, is unsupported by any authority, and would create chaos in the courts.

The Fifth Circuit Court determined that the trial court properly employed its discretion to allocate peremptory strikes as specifically authorized in 28 U.S.C. Section 1870.

It found the trial court properly exercised its discretion to deny Petitioner's challenge for cause to juror Bray. It found in each instance that the Petitioner failed to demonstrate harm by indicating that any member of the jury selected was unsatisfactory to it at the time the jury was empaneled. The cumulative effect of two correct rulings by the trial judge cannot amount to error as urged by Petitioner.

2. THE JURY SELECTION QUESTION EMBODIED IN THE PETITION FOR WRIT OF CERTIORARI IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S REVIEW.

The frivolity of the jury selection issue is demonstrated by Petitioner's failure to include this issue in its Suggestion for En Banc Hearing in the Fifth Circuit Court of Appeals. Were the issue one of exceptional importance to the public or one involving a real or apparent conflict among the circuit courts of appeal, surely it would have appeared in the requested en banc review. It did not.

In this Court, Petitioner does not suggest that the Fifth Circuit's opinion poses a conflict with a decision of this Court or that of another federal court of appeals. Rather, it seeks this Court's review of the joint effect of two discretionary rulings by a trial court judge, acts which have individually withstood the scrutiny of the appellate court below. Whether juror Bray should or should not have been struck for cause in this case and whether the allocation of peremptory challenges was unfair in light of his inclusion in the panel, an argument wholly lacking in legal logic, are questions of concern only in the context of the facts of this case and to its parties. Their review is not the type contemplated under Rule 17.1 of the Supreme Court

Rules[3] nor opinions of this Court. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."); *Ex parte Lau Ow Bew*, 141 U.S. 583 (1891) (Review by certiorari should be sparingly exercised, used only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions.).

CONCLUSION

Petitioner's Question Number 2 presented in its Petition for Writ of Certiorari urges this Court to review jury selection issues committed to the discretion of the trial

---

3. Rule 17.1 of the Supreme Court Rules provides:

Rule 17. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

judge, affirmed by the Fifth Circuit, and deemed so insignificant by Petitioner as to be omitted from its Suggestion for En Banc Hearing. There is no conflict between the jury selection rulings below and any pronouncement of this Court or that of any circuit court of appeals. None of the criteria of Rule 17.1 are met in this Petition. Petitioner obviously seeks a new trial so that it can reform a faulty trial strategy that failed at the trial of this case two years ago. Respondents Cox and Cade respectfully pray that Writ of Certiorari be denied.

Respectfully submitted,

JONES, JONES, CURRY & ROTH
P.O. Drawer 1249
Marshall, Texas 75670
214/938-4395

By FRANKLIN JONES, JR.
Attorneys for Respondents Cox and Cade

CERTIFICATE OF SERVICE

I hereby certify that th.ee (3) copies of the foregoing Brief of Respondents Cox and Cade in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been mailed by United States mail, first-class postage prepaid, addressed to the attorneys for Petitioner, Mr. Daniel V. Flatten, Mr. James L. Webber, and Mr. Bryan R. Davis, Mehaffey, Webber, Keith & Gonsoulin, Interfirst Tower, P.O. Box 16, Beaumont, Texas 77704 and Mr. William C. Gooding, Wheeler, Gooding & Dodson, P.O. Box 1838, Texarkana, Texas 75504, and to the attorneys for Respondent Missouri Pacific Railroad Company, Mr. Mike A. Hatchell, P.O. Box 629, Tyler, Texas 75701, on this the 8th day of December, 1986 at the time of filing with the Clerk. All parties required to be served have been served.

FRANKLIN JONES, JR.
Counsel for Petitioner

APPENDIX A

SECOND SUPPLEMENTAL RECORD ON APPEAL

THE COURT: I assume there is an objection to the jury as constituted, is that correct?

MR. WEBER: There is, after having seen the strike list, Your Honor.

THE COURT: When we come back at 1:30, we will correct it.

Is there any objections to the Court correcting it?

MR. FLOCK: Not from me.

THE COURT: The plaintiffs?

MR. JONES: No, sir.

REPORTER'S NOTE: Whereupon the noon recess was taken by the Jurors and the following proceedings were heard after the Jurors left the courtroom.

THE COURT: Be seated.

Now, you wish to place a matter on the record, gentlemen?

MR. WEBER: Comes now the Kansas City Southern Railway and, prior to selection of the Jury, would lodge its objection to the Court's allowance of strikes and would show that the Court –

THE COURT: First of all, Mr. Weber, let me make sure the record reflects what the Court has done. The Court in conference in chambers with counsel, was advised that there was legitimate controversy between the two railroads, defendant and third party defendant. The Court permitted additional strikes in that the Court gave plaintiffs four (4) strikes, each defendant two (2) strikes each

and each defendant one (1) strike for the alternate and, the plaintiffs one (1) strike for the alternate.

MR. WEBER: That is our understanding, Your Honor. Having done that, the Kansas City Southern feels, Your Honor, that based on comments made by Mr. Flock that the Missouri Pacific is adverse to the plaintiffs only insofar as the extent and duration of damages is concerned. That the allegations of strikes is unfavorable for this reason. The Kansas City Southern trying a case against two opponents essentially, the Missouri Pacific and the Plaintiffs, the Missouri Pacific, on the other hand, is really trying a case, other than on damages, which the evidence will show how much it is contested other than damages, trying a case only against Kansas City Southern. The plaintiffs is trying a case, really, only against the Kansas City Southern and what we end up with is plaintiffs with four (4) strikes, the Missouri Pacific with whom the plaintiff's interests are very closely aligned and total alignment on liability with another two (2) strikes for the MOP and the KCS with only two (20 strikes. At least on liability we are sitting in a situation where the KCS has two (2) strikes and they have six (6). I realize they did not strike together.

Nevertheless when one looks at his jury list, that is the way he looks at it, and, Your Honor, I just feel like that it would have been fairer to give – do it some other way, perhaps give each defendant two (2) or to, I don't think MOP wanted to strike with KCS anyway, but I would think the fairest way would have been give each party – I mean, each defendant two (2) strikes and let it go at that.

THE COURT: Counsel, you have preserved your point.

MR. WEBER: I might add, Your Honor, that on the damage aspect of the case, each defendant had two (2)

strikes and, of course, not collaborate and the plaintiffs had again four (4) strikes on damages.

THE COURT: The objection is overruled.

MR. WEBER: Thank you.

THE COURT: Gentlemen, it will be necessary for you to return at 1:30 since we need to correct the clerical error on the jury.

We are in recess.